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Effective Investigations and Report Writing for UC: Practical Skills for Internal Investigators

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Why have an internal grievance process?



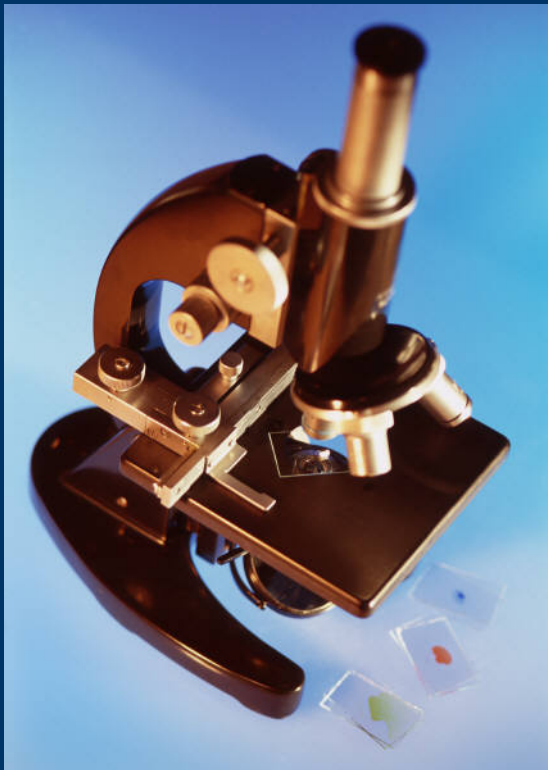
- Lower turnover minimize conflict before things get out of hand
- Improve morale/working conditions = more productivity
- Reduce litigation or have better litigation position
- Public relations issues
- Duty to exhaust admin. remedies
 - ***Palmer and Schifando Cases***



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Why are effective investigation skills important?



- Legal changes - affirmative defense/defense to damages
- Investigator's credibility and the process at stake
- Obligation to provide environment free of harassment



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Agenda Topics



- Receiving complaints
- Understanding Neutral role
- Planning/Conducting the Investigation
- Documentary Issues
- Attorney-Client Privilege/Documentation
- Writing the Report



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Performing an Effective Investigation



- Why is it important?
 - Legal defenses
 - Credibility of process
 - Provides insight into issues in the workplace



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When is a “formal” investigation necessary?



- Inquiry into the facts required in most cases
- Informal resolution may be possible
- Review applicable policy/procedure



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Understanding your role as a neutral

- Impartiality
- Conflict of interest
- Know your own biases
- How will you be perceived?
- When to use outside investigator
- Exercise





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ORGANIZING/PLANNING THE INVESTIGATION



- Taking the Complaint
- Planning
- Gathering evidence
- Interviewing
- Follow-up
- Decisions & Documentation
- Remediation



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Receiving the Complaint



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Dealing with Employment Issues

- **Should someone be placed on administrative leave?**
- **Alternate work arrangement?**
- **Substance abuse issue?**
- **Is there a violence/safety issue?**





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Receiving the Complaint

- **Get as much detailed information from the complainant as possible**
- **Listen impartially without committing yourself**
- **Evaluate the Complaint from the Complainant's perspective**





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- Advise the complainant appropriately about what you intend to do
- Address confidentiality, non-retaliation, and current job issues





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**Identify the
issues**

Then...

**Select the
Means**

**The Specific
Allegations**



Interviews

Documents

**Laws,
Policies &
Procedures**

Other



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Policies

Sexual Harassment Policy

Whistleblower Policy

Non-discrimination Policy

Computer / Email Policy

Faculty Code of Conduct

Union Contract

Student Code of Conduct





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**Identify the
issues**

Now ...

**Select the
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Interviews

Documents

Other



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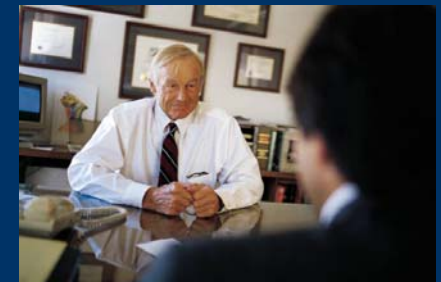
Selecting the Means

Document Review

**Electronic and
Computer Review**



Interviews





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Documents

- Personnel files
- “Desk” or “drop” files
- Medical files?
- Expense files
- Project files
- Documents in possession of the complainant, respondent and witnesses



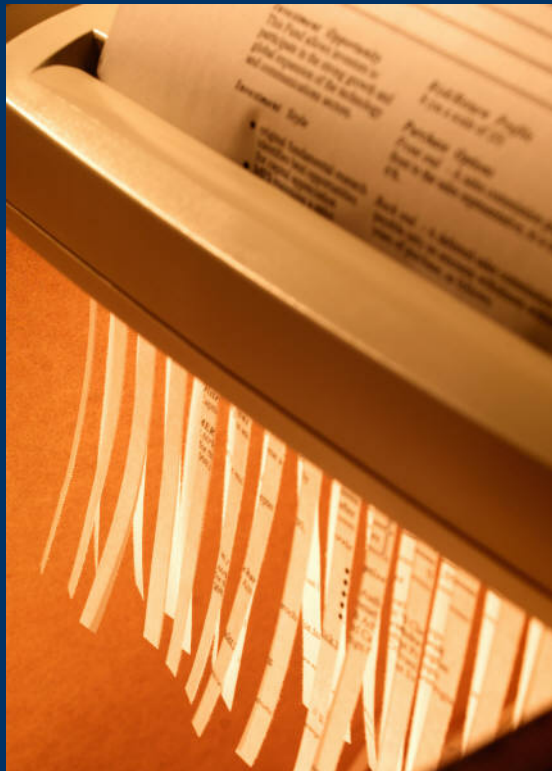


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Document Issues

- Privacy
- File retention
- Discovery
- Public records Act
- “Need to know” – proper dissemination

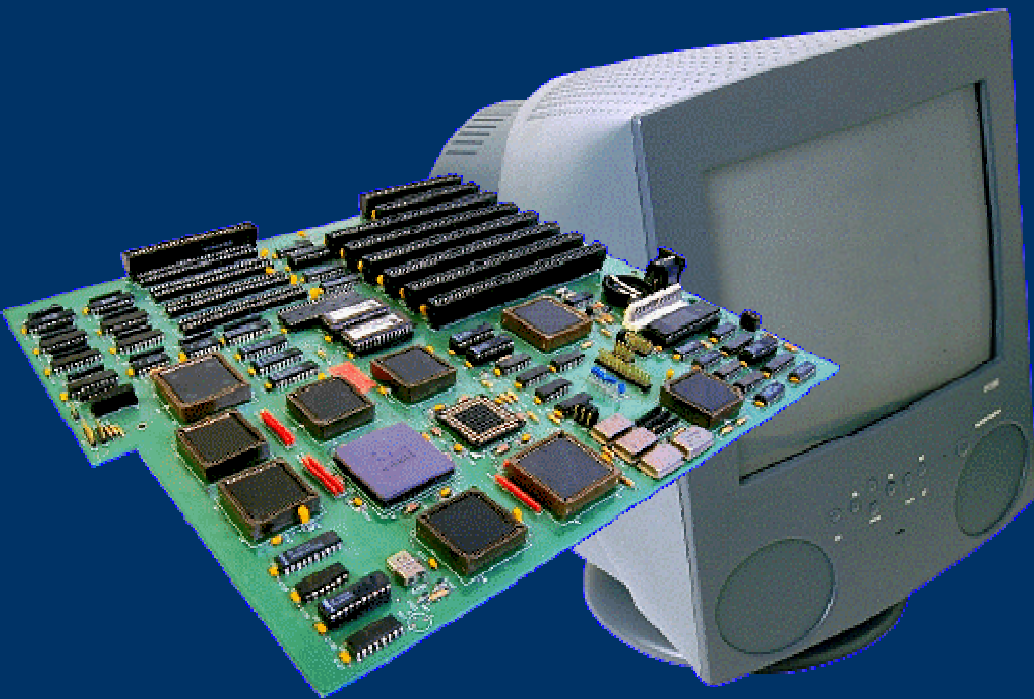




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Electronic Data & Communications



- Computer disks
- E-mails on the system
- E-mail stored
- Cameras
- Recordings
- Internet searches



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Report from Information Services

- E-mails
- Computer disks
- Data easily lost
- What is the consequence?





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Interviewing Issues:





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“Can I get back to you this afternoon?”

**The importance of
timing**

**Managing the
agenda**

**Coordinating with
necessary parties**





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The Interview Environment

- **Interview is not coerced - employee free to leave**
- **Establish interviewee can understand you. (English speaking, need any accommodation?)**
- **Identify applicable policies (e.g. sexual harassment)**
- **Address confidentiality and retaliation as necessary**
- **Have contingency plan for workplace violence**





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- **Employee representation**
Weingarten/Epilepsy Foundation rights are implicated – participation by representative
- **5th Amendment – criminal matters**
- **Have resources in mind for EAP, health care, counseling**





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“I want my lawyer!”

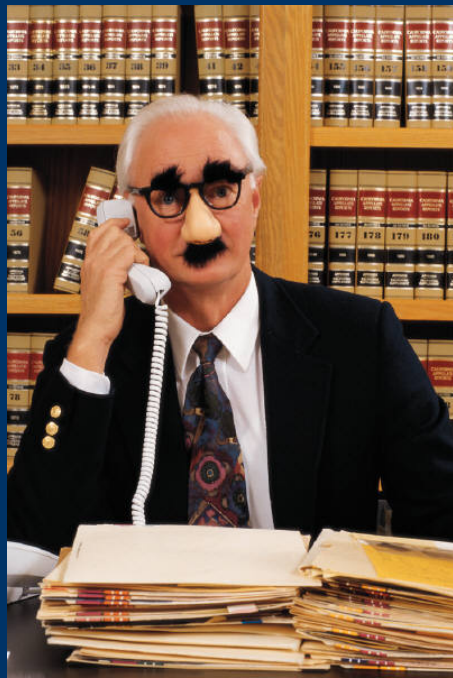




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Attorneys



- No “right to counsel” as an advocate
- How to deal with a lawyer
- “Taking the Fifth” – employee duty to cooperate

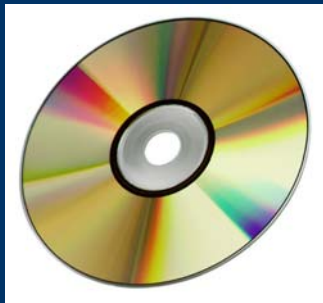
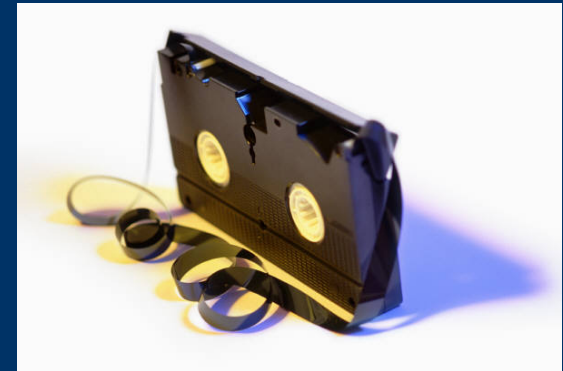


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“Mind if I tape?”

**Taping and
wiretap laws**



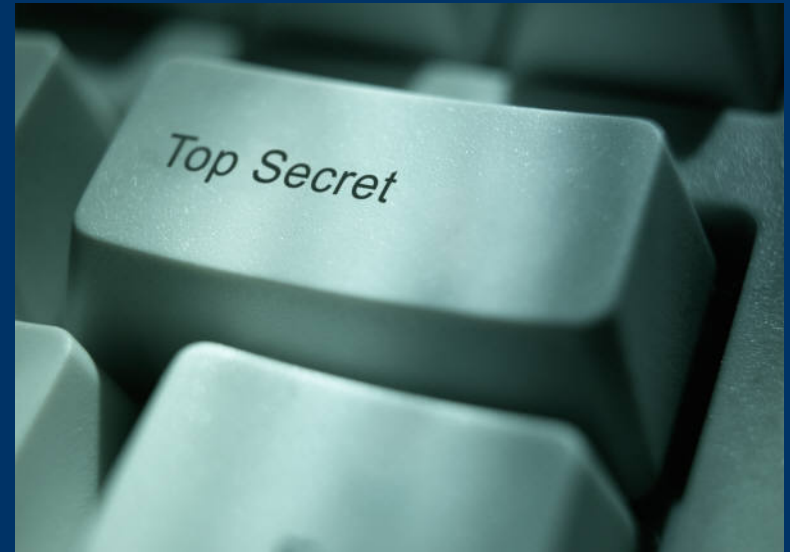
**Advisability of
recording**



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**How
confidential is
an
investigation?**





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Planning for Confidentiality

- **Identify why interviews or other data must be confidential**
- **Have in mind how you are going to use notes and memos before you write them**
- **Think about advising witnesses how information they give may be used (without making blind commitments)**





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Planning for Confidentiality

- Think of ways to give the accused notice of the claims against him/her without compromising confidentiality
- If possible, inform the accused that information withheld exists, and explain the need for confidentiality
- Make a record of your reasoning.





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Confidentiality: The Balance

Confidentiality

***Fair opportunity
to respond***





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Confronting the Accused

Two goals:

- Information gathering
- “Fair opportunity to respond”





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“Fair Opportunity to Respond”

- Not the same as “due process”
- Not “all the embellishments of a court trial”
- Not by adherence to a single mode of process

– *Cotran v. Rollins Hudig Hall Int’l, Inc.*, 17 Cal. 4th 93, 108 (1998)





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“Fair Opportunity to Respond”

“Any one of a variety of procedures which afford *a fair opportunity for an applicant to present his position.*”

- *Cotran v. Rollins Hudig Hall Int'l., Inc.*, 17 Cal. 4th 93, 108 (1998)





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Forgetful witnesses:

“I don’t remember”: Key questions to ask and document

“Let me give you this information, so that you can respond”

Refreshes recollection
And chance to respond

“Is there anything else that you would like to add about this?”

Chance to respond

“Who should we speak with concerning this claim”

Chance to respond

“Is there any other evidence or fact that you believe would help us resolve this?”

Chance to respond

“Here is my card and beeper number. If you have any other

Chance to respond



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“Why don’t I just agree to resign?”

**University’s investigation -
not the claimant’s**

**Can I close the investigation
now, or will there still be
outstanding issues?**



How will this play out down the road?

Be prepared to document and justify



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“We’re dealing with possible criminal conduct here.”

Sexual Assault

Facilitating report
of misconduct to
police

Cooperating with
the police





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Follow -up

- New facts or allegations may require follow-up interviews
- New places to look for documents or other evidence
- New or omitted questions
- A party must have a chance to respond to any fact that you intend to use against him.



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When You Become the Target





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Guidelines for handling a personal accusation

- 1. Stay calm**
- 2. Remain focused on the investigation**
- 3. Immediately draw upon your management resources**
- 4. Give the accuser options that take you off the hot seat**
- 5. Document**
- 6. Don't be defensive: nobody is perfect**



Reaching a Decision

- **Make determinations as to each allegation**
- **Document your reasoning**
- **Apply your policies, not the law**



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Making Credibility Determinations

- ✓ **Consistency**
- ✓ **Corroboration**
- ✓ **Detail**
- ✓ **Memory**
- ✓ **Bias**
- ✓ **Sensitivity to Diversity issues**



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REMEDIES

- Discussion with department regarding appropriate discipline
- Discipline or Discharge for accused?
- Protection for complainant?
- Discipline for other employees?



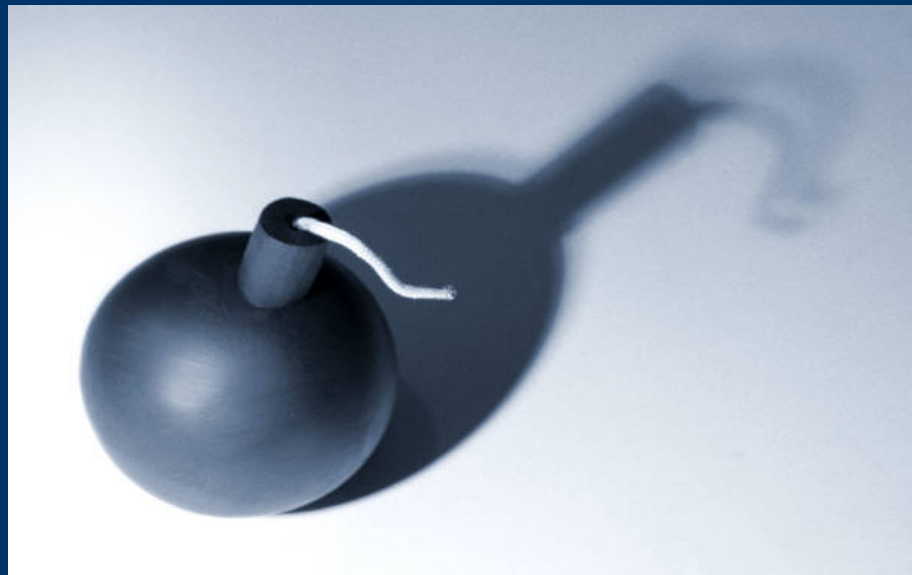


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Resolving Issues

- Concern about retaliation





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Remediation

- Understand what the department wants you to do
- How to recommend effective, practical discipline
- Consider consistency with other cases





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Remediation

- Discipline the right people
- Address any broader problems with meetings, training, counseling, or with the department
- Document what has been done





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ATTORNEY-CLIENT PRIVILEGE ISSUES

- Definition
- When should a report or investigation be subject to privilege?
- What are risks of privileged investigation? (cover-up)
- Coordination with OGC





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Writing the Report

“Style to be good must be clear . . . Speech which fails to convey a plain meaning will fail to do just what speech has to do Clearness is secured by using the words . . . that are current and ordinary. - *Aristotle*





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Writing the Report

- **Know your role – fact finder or advocate?**
- **Clearly organize the report**
- **Expect your reports to be exhibits**





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Documentation

- Address all issues raised
- Make a record of your reasoning
- Avoid unnecessary controversial comments
- Avoid conclusions of law
- Write for posterity





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Writing the Report

- **Issue- often more than one**
- **Rule – what policies, CBAs, past practices apply**
- **Analysis -integration of facts with rules for each issue**
- **Conclusion – derived from facts, not opinion or law**





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Writing the Report

- An Exercise:
 - Groups A
 - Groups B
- Remember Ground rules
- Expectations



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Responding to Agency Charges

- **Beware of conflicts of interest with co-defendants**
- **Labor Code section 2802**
- **Gov. Code section 995**





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DEFENSE OBLIGATIONS

- Decide early whether separate counsel necessary
- Reservation of Rights letter?

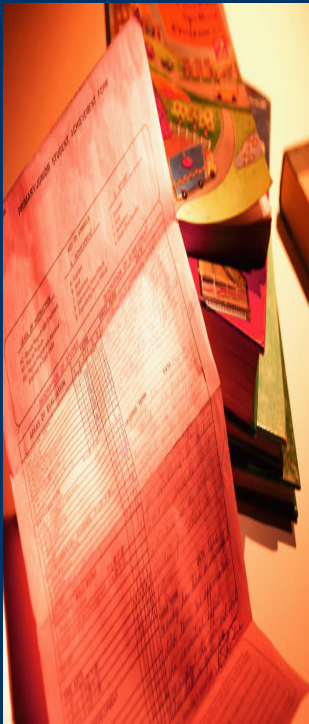




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Drafting the Agency Response



- ✓ Consider telling the story from the University's point of view
- ✓ Stick to the facts – avoid conclusory reports
- ✓ Not necessary to follow DFEH/EEOC questionnaire format
- ✓ Consult with counsel for difficult legal issues

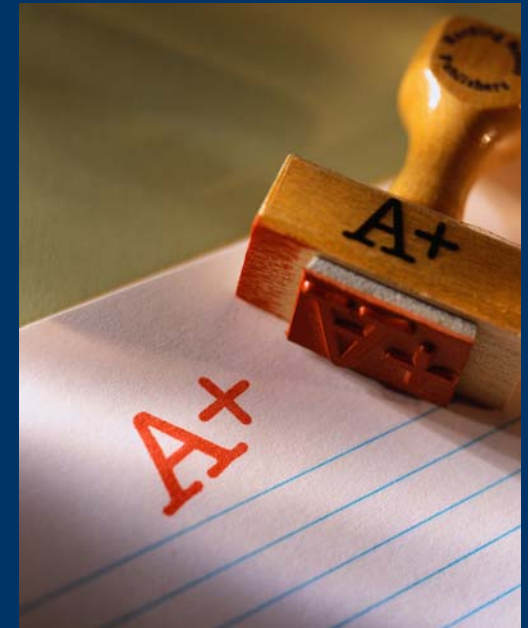


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Best Practices

- **Meet with alleged harasser 2-3 times to elicit explanation/comments**
- **Interview all witnesses suggested by complaint/respondent**
- **Interview co-workers of both parties**
- **Provide thorough, written, impartial report**



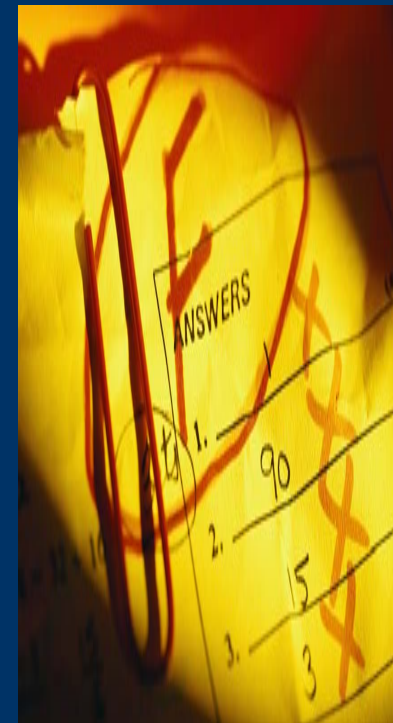


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Worst Practices

- Interviewing personal non-work contacts of complainant
- Investigating prior non-work criminal/civil actions
- Failing to interview opposite sex co-workers of the respondent
- Failing to complete investigation in timely manner
- Failure to follow own policies/procedures
- Retaliation

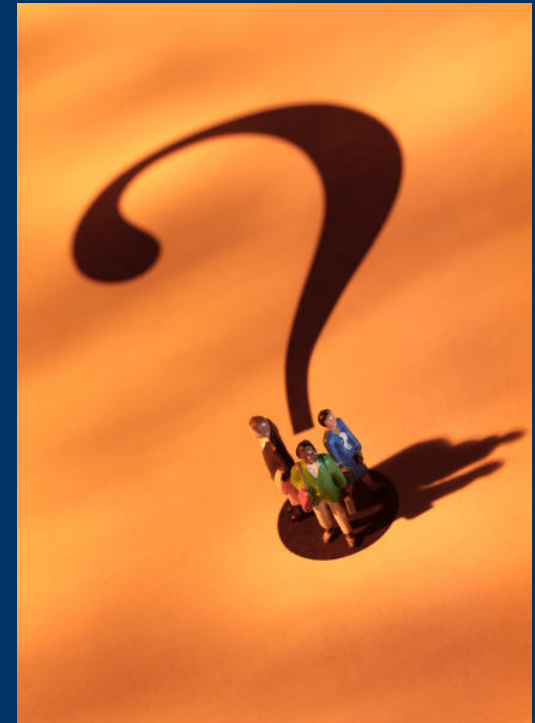




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Questions & Answers





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FIN.
THANK YOU FOR YOUR
KIND ATTENTION!

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